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**BEFORE THE SURFACE TRANSPORTATION BOARD**

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STB FINANCE DOCKET NO. 35291

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**REPLY IN OPPOSITION TO STERLITE (USA), INC. – ACQUISITION AND  
OPERATION EXEMPTION – COPPER BASIN RAILWAY, INC., LINE  
IN PINAL AND GILA COUNTIES, AZ, PETITION FOR WAIVER OF  
49 C.F.R. § 1150.32(E)**

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MILBANK, TWEED, HADLEY & McCLOY LLP  
Gregory Evans  
601 South Figueroa Street  
30th Floor  
Los Angeles, California 90017-5735  
(213) 892-4000

Robert Winter  
International Square Building  
1850 K Street, N.W.  
Suite 1100  
Washington, DC 20006  
(202) 835-7500

Counsel for ASARCO Incorporated and  
Americas Mining Corporation

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ASARCO Incorporated and Americas Mining Corporation (together, the “Parent Companies”) hereby submit their Reply in Opposition to Sterlite (USA), Inc. (“Sterlite”) – Acquisition and Operation Exemption – Copper Basin Railway, Inc., Line in Pinal and Gila Counties, AZ, Petition for Waiver of 49 C.F.R. § 1150.32(e), STB Finance Docket No. 35291 (STB Served Aug. 14, 2009) (the “Petition”). The Parent Companies, through their subsidiaries, are current owners of the Copper Basin Railway (the “CBRY”), and as such have an interest in proceedings which might adversely affect employees. For the reasons set forth herein, the Petition should be denied.

**I. INTRODUCTION**

Under section 1150.32(e) of the Code of Federal Regulations, a purchaser of a rail carrier with annual operating revenue of more than \$5 million must certify to the Surface Transportation Board (the “STB”) that it has posted notice in the workplaces of employees affected by the proposed transaction, and that this certification must precede a filing of Notice of Exemption by 60 days. Under the plain language of 1150.32(e), and

as stipulated by Sterlite in its concurrently filed Notice of Exemption, this applies to Sterlite's proposed purchase of the Copper Basin Railway. *See Sterlite (USA), Inc. – Acquisition and Operation Exemption Copper Basin RY., Inc., Line, in Pinal and Gila Counties, AZ, Verified Notice of Exemption of Sterlite (USA), Inc. Pursuant to 49 C.F.R. §§ 1150.31-1150.34* ), STB Finance Docket No. 35291 (STB served August 14, 2009) (the "Notice of Exemption"). Moreover, STB decisions, including those cited by Sterlite in its Petition, hold that the STB takes seriously the requirements of 1150.32(e) and will not ordinarily grant such a waiver.

**II. STERLITE MUST COMPLY WITH EMPLOYEE NOTICE PROVISIONS OF 49 C.F.R. § 1150.32(E) PRIOR TO FILING A NOTICE OF EXEMPTION, AND SHOULD NOT BE GRANTED A WAIVER OF THESE REQUIREMENTS**

Sterlite has failed to comply with employee and labor notice requirements under 49 C.F.R. § 1150.32(e) in an effort to hurry its attempted purchase of the Copper Basin Railway. Sterlite is attempting to cast aside due process protections in favor of a quick closing. This is behavior that the STB should not condone.

Instead of providing CBRY employees with the required 60 day notice, Sterlite petitions the STB to waive this requirement. Sterlite attempts to justify why 30, instead of 60 days notice is sufficient by referring to explanations set forth in its Petition<sup>1</sup>, which include that its intentions to retain operations and employment conditions obviate the full notice requirements under 49 C.F.R. § 1150.32(e). Sterlite has failed to demonstrate that it should be excepted from this critical procedural safeguard.

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<sup>1</sup> Under 49 C.F.R. § 1150.33(e)(2), a notice of exemption must provide to the STB a Proposed Time Schedule. In its Notice of Exemption, Sterlite's Proposed Time Schedule indicates an intention to consummate purchase of the CBRY within 30 days of filing its Notice of Exemption, thus circumventing the 60 day notice requirement in 49 C.F.R. § 1150.32(e).

The STB does not ordinarily grant waivers to employee notice requirements under 49 C.F.R. § 1150.32(e). In fact, the STB has often admonished applicants for seeking such waiver, stating that compliance with these notice requirements should not be taken lightly. *See Georgia Southwestern R.R., Inc. – Acquisition Exemption – CSX Transp., Inc.*, STB Finance Docket No. 35176 (STB served October 3, 2008); *SSP R.R. Holding LLC – Acquisition and Operation Exemption – Mital Steel USA Ry. Inc. [Request for Waiver of 49 CFR 1150.32(e)]*, STB Finance Docket No. 35129 (STB served April 29, 2008); *Pav R.R., Inc. – Acquisition and Operation exemption – Assets of N&T Ry. Co. LLC*, STB Finance Docket No. 34450 (Served on December 19, 2003). Here, Sterlite has provided the STB no recognized reason why it should depart from its ordinary practice of requiring that it provide 60 days notice to CBRY employees. As such, this Petition should be denied.

**A. Decisions Cited by Sterlite do not Support its Petition for Waiver of Employee Notice Requirements Because Those Cases Represent Corporate Family Transactions Involving no Substantive Change in Management**

Situations in which the STB has granted waiver of § 1150.32(e) are factually distinct from Sterlite's situation. In *ARZC Operating Co.*, a decision cited by Sterlite, the proposed transaction for which STB granted waiver of § 1150.32(e) involved elimination of a holding company and transfer of ownership to a subsidiary. *See ARZC Operating Co. – Acquisition & Operation Exemption – ParkSierra Corp.*, STB Finance Docket No. 34198 (STB served May 14, 2002). In that case, the same management continued to operate the railroad, and the proposed acquisition was one in form and not substance.<sup>2</sup>

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<sup>2</sup> Sterlite inflates the weight of authority by citing to two other decisions involving the exact same transaction. *See CFNR Operating Co – Acquisition & Operation Exemption – ParkSierra Corp.*, STB Finance Docket No. 34199 (STB served May 14, 2002); *PSAP Operating Co – Acquisition & Operation*

In *Lake Michigan & Ind. R.R.*, the other decision cited by Sterlite, the applicant acquired interests in a rail service when its corporate sibling dissolved. *Lake Michigan & Ind. R.R. – Acquisition & Operation Exemption – Keystone R.R. [Request for Waiver of 49 C.F.R. 1150.32(e)]*, STB Finance Docket No. 34140 (STB served December 27, 2001). As in *ARZC Operating Co*, the STB granted a petition for waiver of § 1150.32(e) because there was no change in management and no concomitant uncertainties and risks to employees.<sup>3</sup>

These decisions are in stark contrast to Sterlite’s proposed purchase of the CBRY, and lend no support to Sterlite’s contentions that it should be granted waiver. Unlike the applicants in these cited cases, Sterlite has no experience in managing rail services, it is not in the corporate family of CBRY’s sellers, ASARCO, LLC or the Parent Companies, and its proposed purchase represents a complete overhaul in management, not only in form, but in substance. Sterlite’s position is altogether distinct from the few situations in which a waiver has been granted and as such it should not be granted such a waiver.

**B. STB’s Policy Disfavors Waiving Notice Requirements Under 49 C.F.R. 1150.32(e) When There is a Proposed Substantive Change in Management**

Moreover, it is STB’s policy that for any transaction in which there is a change in management, the acquirer must provide notice to prospective employees. In expanding the notice requirement to its present 60 day period, the STB stated its intent to “make

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*Exemption – ParkSierra Corp*, STB Finance Docket No. 34200 (STB served May 14, 2002). In both *CNFR Operating Co* and *PSAP Operating Co.*, the transaction was structured to eliminate a holding company, the same company as in *ARCZ Operating Co.*

<sup>3</sup> Sterlite again inflates the weight of authority upon which it relies by citing to two decisions involving two identically situated applicants in the same transaction that understandably obtained the same results as the applicant in *Lake Michigan & Ind. R.R.* See *Keystone R R – Acquisition & Operation Exemption – Keystone R R.*, STB Finance Docket No. 34157 (STB served December 27, 2001); *Patapsco & Back Rivers R.R. – Acquisition & Operation Exemption – Patapsco & Back Rivers R.R.*, STB Finance Docket No. 34159 (STB served December 27, 2001).

available more information to employees, and thus to their local communities, that may be affected by line sale transactions.” *Acquisition of Rail Lines Under 49 U.S.C. 10901 and 10902 – Advance Notice of Proposed Transactions*, STB Ex Parte No. 562 (Served September 9, 1997).

The fact that the CBRY will be owned and operated by new management as a result of the proposed transaction is important information to potential employees and must be communicated pursuant to § 1150.32(e). This is particularly critical where new management, as in Sterlite’s case, has no independent railway management experience. Thus, Sterlite’s assertions that it does not intend to change operations in the CBRY do not eliminate the need to provide mandated notice to employees.

#### **IV. CONCLUSION**

For the foregoing reasons, Sterlite’s Petition should be denied.

Dated: August 25, 2009

**MILBANK, TWEED, HADLEY & McCLOY LLP**

By: /s/ Gregory Evans

Gregory Evans  
State Bar No. 147623  
601 South Figueroa Street, 30th Floor  
Los Angeles, California 90017-5735  
Telephone: (213) 892-4000  
Facsimile: (213) 629-5063  
[gevans@milbank.com](mailto:gevans@milbank.com)

Robert Winter  
(RW 9937)  
1850 K Street N.W.  
Suite 1100  
Washington, DC 20006-2236  
Telephone: (202) 835-7500  
Facsimile: (202) 835-7586  
[rwinter@milbank.com](mailto:rwinter@milbank.com)

*Counsel for ASARCO Incorporated and  
Americas Mining Corporation*

### **CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the above and foregoing document by electronic mail on this 25th day of August, 2009 on all parties of record in this proceeding.

/s/ Jason Cole  
Jason Cole